No. 95-559

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DOCTOR'S ASSOCIATES, INC. AND NICK LOMBARDI,
Petitioners,

v.

PAUL CASAROTTO AND PAMELA CASAROTTO,
Respondents.

On Writ of Certiorari to the
Supreme Court of Montana

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does Section 2 of the Federal Arbitration Act — which provides for the enforcement of voluntary arbitration agreements — preempt a state law aimed at assuring that such agreements are, in fact, knowingly entered?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Montana Arbitration Statute. 2
B. The Casarottos' Dispute with DAI. 5
C. Proceedings Below. 7

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. THE MONTANA NOTICE REQUIREMENT IS NOT PREEMPTED BECAUSE THE STATE STATUTE REPRESENTS A CODIFICATION OF GENERAL CONTRACT LAW PRINCIPLES. 15

A. General Contract Principles Invalidate Terms in Standardized Contracts That Are Beyond The Reasonable Expectations of a Party. 17

B. Inconspicuous Arbitration Provisions in Standardized Agreements May Be Invalidated Under General Contract Principles. 19

II. MONTANA'S EFFORT TO ENSURE THAT ARBITRATION AGREEMENTS ARE ENTERED VOLUNTARILY IS NOT PREEMPTED BECAUSE ITS NOTICE REQUIREMENT DOES NOT CONFLICT WITH THE OPERATION OF THE FEDERAL ARBITRATION ACT. 25

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Pages

Allied-Bruce Terminix Cos., Inc. v. Dobson,
115 S. Ct. 834 (1995) . . . . . *passim*

Berkemer v. McCarty,
468 U.S. 420 (1984) 11

Bray v. Alexandria Women's Health Clinic,
113 S. Ct. 753 (1993) 11

Broemmer v. Abortion Servs. of Phoenix Ltd.,
840 P.2d 1013 (Ariz. 1992) 12, 19, 20

Burgess Constr. Co. v. State,
614 P.2d 1380 (Alaska 1980) 18, 19

C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.,
227 N.W.2d 169 (Iowa 1975) 18

Cate v. Dover Corp.,
790 S.W.2d 559 (Tex. 1990) 18, 21

Chor v. Piper, Jaffray & Hopwood, Inc.,
862 P.2d 26 (Mont. 1993) 5, 20, 21, 29

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 26

Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213 (1985) 12, 25

Downey v. Christensen,
825 P.2d 557 (Mont. 1992) 5, 29

Dunfee v. Baskin Robbins, Inc.,
720 P.2d 1148 (Mont. 1986) 23

English v. General Elec. Co.,
496 U.S. 72 (1990) 26

First Options of Chicago, Inc. v. Kaplan,
115 S. Ct. 1920 (1995), ... 16, 17

Frates v. Edward D. Jones & Co.,
760 P.2d 748 (Mont. 1988) 29

Graham v. Scissor-Tail, Inc.,
623 P.2d 165 (Cal. 1981) 19

Hines v. Davidowitz, 312 U.S. 52 (1941) 26

Jones v. Rath Packing Co.,
430 U.S. 519 (1977) 26

Larsen v. Opie,
771 P.2d 977 (Mont. 1989) 5, 29

Mastrobuono v. Shearson Lehman Hutton, Inc.,
115 S. Ct. 1212 (1995) 16, 17

Miller v. Fallon County,
721 P.2d 342 (Mont. 1986) 23

Mills v. Agrichemical Aviation, Inc.,
250 N.W.2d 663 (N.D. 1977) 18

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,
473 U.S. 614 (1985) 17, 24

Mueske v. Piper, Jaffray & Hopwood, Inc.,
859 P.2d 444 (Mont. 1993) 29, 30

Palmer Steel Structures v. Westech, Inc.,
584 P.2d 152 (Mont. 1978) 2

Passage v. Prudential-Bache Secs., Inc.,
727 P.2d 1298 (Mont. 1986) 5, 20, 21, 29

Perry v. Thomas,
482 U.S. 483 (1987) 15, 17, 25

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 11

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 16, 27, 28

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 26

Rodriguez De Quijas v. Shearson/ American Express, Inc.,
490 U.S. 477 (1989) 24

Shearson/American Express Inc. v. McMahon,
482 U.S. 220 (1987) 25

Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.,
890 F.2d 108 (9th Cir. 1989) 18

Southland Corp. v. Keating,
465 U.S. 1 (1984) . . . . . *passim*

Steven v. Fidelity and Casualty Co. of New York,
377 P.2d 284 (Cal. 1963) 19

Transamerica Ins. Co. v. Royle,
656 P.2d 820 (Mont. 1983) 19

Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) . . . . . *passim*

Vukasin v. D.A. Davidson & Co.,
785 P.2d 713 (Mont. 1990) 5, 29

Wheeler v. St. Joseph Hosp.,
63 Cal. App. 3d 345 (1976) 13, 20, 23

William Gibson, Jr., Inc. v. James Graff Communications, Inc.,
780 P.2d 1131 (Mont. 1989) 5, 29

Wortman v. Montana Cent. Ry. Co.,
56 P. 316 (Mont. 1899) 2

STATUTES

9 U.S.C. § 2 . . . . . *passim*

15 U.S.C. § 1012 32

Cal. Ins. Code § 332 (1995) 33

Cal. Ins. Code § 778.4 (1995) 33

Cal. Corp. Code §§ 25000—25804 (1995) 32

Cal. Corp. Code, §§ 31000—31516 (West Supp. 1996) 31

Haw. Rev. Stat., §§ 428-E1—428E-12 (1995) 31

815 ILCS §§ 705/1, *et seq.* (1996) 31

Ind. Code Ann. §§ 23-2-2.5-47, *et seq.* (Burns 1995) . 31

Md. Bus. Reg. Code Ann. §§ 14-102—14-233 (1995) . 31

Mich. Comp. Laws § 550.1410a (1994) 33

Mich. Stat. Ann. §§ 19.854(1)—(46) (1994) 31

Minn. Stat. § 60A.207 (1995) 33

Minn. Stat. § 80C.01—80C.14 (1995) 31

Mont. Code Ann. tit. 27, ch. 5 . . . . . 2, 3

Mont. Code Ann. § 27-5-114(4) (1995) . . . . . *passim*

Mont. Code Ann. § 28-2-708 (1984) 2, 3

Mont. Code Ann. §§ 31-1-231(2) & (3) 5

N.D. Cent. Code Ann.
§§ 51-19-01—51-19-17 (1995) 31

N.Y. Gen. Bus. Law
§§ 352-359-h (Consol. 1995) 32

N.Y. Gen. Bus. Law.
§§ 680—684 (Consol. 1995) 31

N.Y. Ins. Law § 3404 (Consol. 1995) 33

R.I. Gen. Laws, §§ 19-28.1-1—19-28.1-34 (1995) . . . 31

S.D. Codified Laws Ann.
§§ 37-5A-1—37-5A-87 (1995) 31

Tex. Rev. Civ. Stat. Ann.
art. 5069-16.01 (West 1996) 31

Va. Code Ann. §§ 13.1-557—13.1-574 (1995) 31

Wash. Rev. Code
§§ 19.100.010, *et seq.* (1995) 31

Wisc. Stat. §§ 553.01—553.78 (1994) 31

LEGISLATIVE HISTORY

Federal Legislative History

H.R. Rep. 96, 68th Cong., 1st Sess. (1924) 16

S. Rep. No. 536, 68th Cong., 1st Sess. (1924) 16

66 Cong. Rec. 984 (1924) 15

Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. (1923) 16, 27

Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) 27

Montana Legislative History

Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the House Judiciary Committee, 49th Leg. (March 13, 1985) 3

Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the Senate Judiciary Committee, 49th Leg. (January 21, 1985) 3, 4

Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the Senate Judiciary Committee, 49th Leg. (February 6, 1985) 4

MISCELLANEOUS

Scott Burnham, *Bad Faith: Courts Find Breaches of Fair Dealing Applicable to Commercial Contracts Too*, Mont. Law. 6 (Nov. 1986) 22, 23

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Staff of House Comm. on Small Business, 101st Cong., 2d Sess., Franchising in the U.S. Economy: Prospects and Problems (Comm. Print 101-4, 1990) 22

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

In April 1988, respondent Paul Casarotto signed an 11-page standard form franchise agreement with petitioner Doctor's Associates, Inc. (DAI) to open a Subway sandwich shop in Great Falls, Montana. J.A. 86-87. Unbeknownst to Mr. Casarotto, on page nine of the agreement was a provision mandating arbitration of all disputes between the parties in Bridgeport, Connecticut. J.A. 86-87. The franchise agreement did not provide notice on the front page in underlined capital letters that the contract was subject to arbitration, as required by Montana statute. Mont. Code Ann. § 27-5-114(4) (1995). The question presented is whether the Montana statute, which is aimed at assuring that parties *know* that they are signing an agreement containing an arbitration clause, is preempted by the Federal Arbitration

Act, 9 U.S.C. § 2 ("FAA"). To answer that question, we begin with the history of the Montana arbitration statute and then turn to the facts of this case and the rulings below.

A. The Montana Arbitration Statute.

In 1985, the Montana legislature adopted the Uniform Arbitration Act. Mont. Code Ann. tit. 27, ch. 5. Prior to the adoption of the Act, the Montana courts refused to enforce arbitration agreements based upon an 1895 statute that voided contractual provisions in which a party "is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights." Mont. Code Ann. § 28-2-708 (1984). *See, e.g., Palmer Steel Structures v. Westech, Inc.*, 584 P.2d 152 (Mont. 1978) (contract provisions which require parties to submit future disputes to arbitration are void as applied to questions of law). This provision codified a common law prohibition on contractual restraints upon legal proceedings that existed in Montana prior to the adoption of the Montana Code in 1895. *Wortman v. Montana Cent. Ry. Co.*, 56 P. 316, 321 (Mont. 1899).

In 1984, this Court announced its decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), regarding the preemptive scope of section 2 of the FAA, 9 U.S.C. § 2. That provision makes an arbitration agreement "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* In *Southland*, this Court concluded that section 2 "appl[ies] in state as well as federal courts," 465 U.S. at 12, and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. In the

wake of this Court's *Southland* decision, the Montana legislature adopted the Uniform Arbitration Act to validate arbitration agreements and to amend section 28-2-708 to exclude arbitration agreements. *See* Mont. Code Ann. tit. 27, ch. 5; Mont. Code Ann. § 28-2-708 (1995).

The principal purpose of the legislation was to allow parties to enforce pre-dispute arbitration agreements. As the bill's sponsor, State Senator Joe Mazurek, explained:

> Even though Montana has arbitration statutes on the books, there is existing case law and statutes in Montana which prohibit parties from agreeing in advance of a dispute to submitting it to arbitration. What this bill would do is allow parties in advance of any dispute arising [to] agree[] to submit a dispute to arbitration and adopts the Uniform Arbitration Act which establishes the procedures under which an arbitration would occur and provides the means for enforcement of awards. . . . [The] principal concern is making the commercial setting where the parties are already arbitrating enforceable.

Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the Senate Judiciary Committee, 49th Leg. (January 21, 1985) (minutes of the Senate Judiciary Committee, at 6); *see also Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the House Judiciary Committee*, 49th Leg. (March 13, 1985) (minutes of the House Judiciary Committee, at 2) ("[T]he bill makes a very significant change in Montana law. It allows parties to enter into an

agreement today to arbitrate a dispute which arises in the future. That is currently prohibited by Montana law.").[1]

During the consideration of Montana's Uniform Arbitration Act, the testimony and legislative statements focused on the positive aspects of arbitration. *See, e.g., Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the Senate Judiciary Committee*, 49th Leg. (January 21, 1985) (minutes of the Senate Judiciary Committee, at 6) (arbitration is less expensive, less cumbersome means of settling disputes; bill will alleviate current clogging of the courts). Concerns were raised, however, about adhesion contracts. *Id.* at 7 (testimony of Montana Trial Lawyers Association). For example, Senator Tom Towe told the Committee about Nannabelle Nickleberry, an elderly woman who signed a home improvement contract which required that disputes be arbitrated in New York. *Id.* at 8. In response to such concerns, the legislation was amended to include the provision at issue in this case:

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.

Mont. Code Ann. § 27-5-114(4); *see also Hearings on Adopting the Uniform Arbitration Act, S.B. 110, before the Senate Judiciary Committee*, 49th Leg. (February 6, 1985) (minutes of the Senate Judiciary Committee, at 8). This is not the only provision that the Montana legislature has

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[1]A copy of the state legislative history is being lodged with the Clerk and served on counsel for petitioners.

enacted to require conspicuous notice of particular terms in standardized form contracts. For example, the Montana Code requires that retail installment contracts provide notice of particular rights in large bold type and that installment contracts for motor vehicles include a specific statement that liability insurance coverage is not included if that is the case. Mont. Code Ann. §§ 31-1-231(2) & (3).

Following the adoption of the Uniform Arbitration Act in 1985, the Montana Supreme Court has repeatedly enforced arbitration agreements. *See Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26 (Mont. 1993); *Downey v. Christensen*, 825 P.2d 557 (Mont. 1992); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713 (Mont. 1990); *William Gibson, Jr., Inc. v. James Graff Communications, Inc.*, 780 P.2d 1131 (Mont. 1989); *Larsen v. Opie*, 771 P.2d 977 (Mont. 1989); *Passage v. Prudential-Bache Secs., Inc.*, 727 P.2d 1298 (Mont. 1986). Thus, as long as parties comply with Mont. Code Ann. § 27-5-114, they can rely on the Montana courts to enforce their agreements to arbitrate.

B. The Casarottos' Dispute with DAI.

In April 1988, Paul Casarotto signed a franchise agreement with DAI to open a Subway sandwich shop in Great Falls, Montana. J.A. 86-87. It was the first and only franchise agreement that Mr. Casarotto had ever signed. J.A. 87. He was told during his phone conversations with DAI representatives that it was a standard agreement and that he could make no changes or modifications to it. J.A. 86-87. There was no indication on the first page of the contract that it was subject to arbitration. J.A. 65. However, on page 9, at paragraph 10(c), the contract included a provision that would require Mr. Casarotto to travel more than two

thousand miles to Bridgeport, Connecticut, to arbitrate any disputes arising out of the contract:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

J.A. 75. The contract also included a provision stating that Connecticut law would govern the contract. J.A. 77. Although Mr. Casarotto admits that he read the agreement before signing it, no one ever told or explained to him that the agreement contained an arbitration clause nor did he understand that he was surrendering his right to sue DAI in Montana. J.A. 87.

The franchise agreement provided that the location of the Subway shop had to be approved by DAI. J.A. 68. After the franchise agreement was signed, DAI assigned Nick Lombardi, an independent contractor, to serve as its Montana Development Agent.[2] Amended Complaint, ¶ 9,

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[2]Mr. Lombardi did not sign the franchise agreement, but appears to claim that he is also entitled to arbitration of the (continued...)

R. 6. Lombardi informed Mr. Casarotto that the location he preferred in Great Falls was not yet available. J.A. 14. Based on Lombardi's promise reserving for him the exclusive right to open a Subway shop in the preferred location when it became available, Mr. Casarotto agreed to open a shop at a less desirable location. J.A. 14. Contrary to their promise, however, Lombardi and DAI subsequently awarded the preferred location to another franchisee. J.A. 14. As a result, the Casarottos lost their business and the collateral securing their loan. J.A. 14.

C. Proceedings Below.

In 1992, respondents Paul and Pamela Casarotto filed suit against petitioners DAI and Lombardi alleging that they breached their agreement with the Casarottos, defrauded them, breached the covenant of good faith and fair dealing, and engaged in other tortious conduct, all of which directly

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[2](...continued)
Casarottos' claims against him, based on a franchise agreement to which he is not a party. Although DAI refers to Lombardi as its development agent, DAI has been equivocal regarding Lombardi's agency status in the proceedings below. Pet. Brief at 3; Appellees' Response Brief in *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994) at 7-8, 21-22, 26. Without conceding the point, even if one were inclined toward the view that the FAA preempts the Montana notice statute, the question remains whether Nick Lombardi can benefit from the arbitration clause since he was not a signatory to the franchise agreement, was not an employee of the signatory (DAI), and was not clearly acting in the capacity as an agent of the signatory. At a minimum, the record has not been sufficiently developed to encompass Lombardi within this arbitration agreement. Because the Montana Supreme Court did not reach the issue of whether the arbitration clause in DAI's franchise agreement would extend to the Casarottos' claims against Lombardi, that issue is not presented here.

caused the Casarottos' loss of business and the resulting damage.[3] J.A. 14.

Petitioners moved in the state district court to dismiss or stay the judicial proceedings pending arbitration, citing the arbitration provisions in the franchise agreement. The district court stayed the lawsuit against DAI and Lombardi pending arbitration pursuant to section 3 of the Federal Arbitration Act. J.A. 10-11. The Casarottos appealed to the Montana Supreme Court.

The Montana Supreme Court reversed, holding that the Casarottos' claims could be litigated. The court reached that result in two steps. First, applying conflict of law principles established in Montana case law, the court held that Montana law governed the franchise agreement between Casarotto and DAI. J.A. 16-21. The Montana court determined that Montana had a materially greater interest than Connecticut in a contract negotiated in Montana, to be performed in Montana, regarding a sandwich shop in Montana, and entered between a Montana resident and a Connecticut corporation. J.A. 19. The Montana court then found that the contractual provision selecting Connecticut law was ineffective because it sought to override the Montana notice of arbitration provision. It found that to apply Connecticut law would violate Montana's fundamental public policy that citizens of Montana are entitled to notice before entering an

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[3]The Casarottos also asserted claims against other Subway franchisees who managed the Casarottos' store. No one has asserted that DAI's arbitration clause is so far reaching as to encompass those claims, which are still pending in the Montana district court.

agreement to waive their right of access under the Montana constitution to Montana's courts. J.A. 20-21.

Second, having determined that the franchise agreement is governed by Montana law, the Montana court then considered whether the notice requirement in Mont. Code Ann. § 27-5-114(4) is preempted by the Federal Arbitration Act. Relying on this Court's analysis in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), the Montana court found that Montana's notice statute is consistent with the goals and policies of the FAA:

> Our conclusion that Montana's notice requirement does not undermine the policies of the FAA is based on the Supreme Court's conclusion that it was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to arbitrate when they have not agreed to do so. That Court held that the purpose of the FAA is simply to enforce arbitration agreements into which parties had entered, and acknowledged that the interpretation of contracts is ordinarily a question of state law. *Volt*, 489 U.S. at 474.
>
> Presumably, therefore, the Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly.

J.A. 27. As the Montana court further noted, "Montana's notice requirement does not preclude parties from knowingly entering into arbitration agreements, nor do our courts

decline to enforce arbitration agreements which are entered into knowingly." J.A. 28. Therefore, the court found that Montana's notice statute is not preempted, and reversed the district court's order staying the litigation. J.A. 28.

Petitioners sought review in this Court, which summarily vacated the Montana court's decision and remanded for further consideration in light of an intervening decision, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 115 S. Ct. 834 (1995). 115 S. Ct. 2552 (1995). In *Terminix*, this Court held that section 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce," reaches broadly to the limits of Congress' Commerce Clause power. 115 S. Ct. at 839-40. Accordingly, this Court reversed an Alabama Supreme Court decision applying a state law making pre-dispute arbitration agreements unenforceable based on the Alabama court's finding that the FAA did not apply to the termite contract at issue there. *Id.* at 837.

On remand, the Montana Supreme Court concluded that its prior decision was consistent with *Terminix*. J.A. 54. The central issue in *Terminix* was whether the contract at issue evidenced "a transaction involving commerce." J.A. 53. The Montana court presumed that the Casarottos' case involved interstate commerce and that any state law which frustrated the purposes of the FAA would be preempted. J.A. 53. The court noted that the challenged Montana statute does not make arbitration agreements invalid and unenforceable; it simply requires notice of an arbitration clause in a contract. J.A. 53. *See also* J.A. 55 (Leaphart, concurring) (the notice statute "furthers the policy of meaningful and consensual arbitration by helping ensure that

the consumer who signs what is most often a nonnegotiated, form contract, knowingly agrees to arbitration in the event of a dispute."). Finally, the Montana court noted that *Terminix* in no way modified the principles from *Volt* on which the Montana court had relied. J.A. 54. Accordingly, the Montana Supreme Court reaffirmed and reinstated its prior decision. J.A. 54. This Court granted certiorari on January 5, 1996.[4]

SUMMARY OF ARGUMENT

Unlike the state requirements that this Court has heretofore found preempted by the Federal Arbitration Act, the Montana notice provision does not reflect any hostility toward the enforcement of arbitration agreements that are knowingly entered. To the contrary, this statutory provision was enacted in the course of modernizing Montana law to bring it into compliance with the FAA by requiring that arbitration agreements are enforceable. Its function is not to prevent arbitration but to help ensure that arbitration is indeed consensual.

Under the Federal Arbitration Act, arbitration is a matter of consent. *Volt*, 489 U.S. at 479. This Court in

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[4]The propriety of the Montana Supreme Court's choice-of-law determination is not before this Court despite petitioners' reference to it. Pet. Brief at 17 n. 10. The only basis on which that ruling could be overturned by this Court is that Montana's choice of law decision violates due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Because petitioners did not seek review of this conclusion, but only of the meaning of section 2 of the FAA, the Court should not consider it. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764-65 (1993); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985), explained that the Act arose not from a desire to force disputes to arbitration, but from the need to overcome an anachronistic judicial hostility to arbitration agreements carried over from English common law. *Id.* at 219-20. "The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements." *Id.* at 219.

Recognizing that, in many instances, arbitration agreements are not "negotiated," but are instead contained in standardized form contracts that are offered on a take-it-or-leave-it basis, like the franchise agreement at issue here, the Montana legislature included a provision in the Uniform Arbitration Act to ensure that parties have actual notice that a contract contains an arbitration clause. Mont. Code Ann. § 27-5-114(4). This notice requirement is not preempted by the Federal Arbitration Act for two reasons.

First, the statute simply codifies general common law contract principles that require unexpected provisions in standardized contracts to be conspicuous. *See* Restatement (Second) of Contracts § 211 (Standardized Agreements) (c), cmt. f. An arbitration provision like the one in the franchise agreement between Mr. Casarotto and DAI is surely vulnerable under a common law contract theory because the standardized form provision for mandatory arbitration two thousand miles away was not within the reasonable expectations of the agreeing party. *See Broemmer v. Abortion Servs. of Phoenix Ltd.*, 840 P.2d 1013 (Ariz. 1992) (standardized form contract which required patient to arbitrate medical malpractice disputes was unenforceable as falling outside patient's reasonable expectations where there

was no conspicuous waiver); *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 361 (1976) (applying adhesion contract principles to an arbitration clause, court found no agreement to arbitrate where clause not specifically called to the patient's attention).

The FAA only requires the enforcement of arbitration agreements to which the parties have consented. The issue of whether a party has knowingly consented to arbitration is a matter of state law, and the FAA expressly provides that states may invalidate arbitration clauses that fail under general principles of contract law. 9 U.S.C. § 2; *see also Terminix*, 115 S. Ct. at 843 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'") (emphasis added). Thus, a state court decision declining to enforce an arbitration clause in a form contract, on the ground that it is not conspicuous, is not preempted by the FAA because section 2 allows states to invalidate arbitration clauses on generally applicable principles of law and equity.

For the same reason, Montana's notice statute is not preempted because the statute simply codifies the common law by requiring arbitration agreements — which are certainly "unexpected" since they had been barred in Montana for over a century — to be conspicuously displayed in order for the court to conclude that the party who did not draft the agreement knowingly agreed to arbitration. Because invalidation of arbitration clauses under the general principle that unexpected terms be conspicuous is permitted by the FAA, the FAA does not preempt a state statute that, as here, codifies the requirement that arbitration clauses be

conspicuous. Indeed, the codification of the conspicuousness requirement benefits those drafting arbitration agreements by relieving them of the uncertainties of case-by-case adjudication of whether a clause is sufficiently conspicuous.

Second, the Montana notice statute is not preempted by the FAA because it does not prevent parties from entering enforceable arbitration agreements, nor does it allow courts to refuse to enforce agreements that are knowingly entered. Thus, the statute does not conflict with the FAA's basic purpose, "to overcome courts' refusals to enforce agreements to arbitrate." *Terminix*, 115 S. Ct. at 838. Indeed, by ensuring that arbitration agreements are entered knowingly, and by establishing a bright-line rule for when appropriate notice and consent have been given, the Montana statute furthers the pro-arbitration policy of the FAA. If notice of the arbitration clause is provided as required by the Montana statute, a party to the contract will be unable to claim that an arbitration agreement was not within her reasonable expectations.

Finally, petitioners' claim that the Montana notice statute is "disruptive and unworkable for anyone transacting business in interstate commerce" is vastly overblown. Pet. Brief at 26. Sophisticated market participants transacting business in multiple states already are obliged to adapt their form contracts, franchise agreements, leases, insurance policies, or securities registrations to the specific requirements of diverse jurisdictions. Companies that are already highly regulated by the states will have no significant difficulty complying with a simple state arbitration notice requirement, and will surely not suffer enough of a burden to frustrate the purposes of the FAA. Indeed, by codifying this common law requirement of conspicuous notice,

Montana has made it easier for foreign corporations to ascertain and comply with Montana law.

ARGUMENT

I. THE MONTANA NOTICE REQUIREMENT IS NOT PREEMPTED BECAUSE THE STATE STATUTE REPRESENTS A CODIFICATION OF GENERAL CONTRACT LAW PRINCIPLES.

The Federal Arbitration Act was enacted in 1925 to ensure that courts enforced agreements to arbitrate. *Terminix*, 115 S. Ct. at 838; *see also* 66 Cong. Rec. 984 (1924) (statement of Senator Walsh) ("[T]he bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced."). The "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Indeed, Congress expressly limited the preemptive reach of the FAA by allowing states to invalidate arbitration provisions "on such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2.

"Congress' principal purpose" in enacting the FAA was to ensure that "private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478. Thus, this Court has held that state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" are preempted. *Southland*, 465 U.S. at 10 (state law that made agreements to arbitrate certain franchise claims unenforceable held preempted because it "directly conflicts" with section 2 of the Act); *Perry v. Thomas*, 482 U.S. 483, 491 (1987)

(similar state law barring enforcement of agreement to arbitrate wage-collection claims held preempted because it was in "unmistakable conflict" with federal policy).

However, this Court has "recognized that the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt*, 498 U.S. at 478. The federal policy favoring arbitration is not designed to promote the broader use of arbitration, but rather to "give effect to the contractual rights and expectations of the parties. . . ." *Id.* at 479; *see also* H.R. Rep. 96, 68th Cong., 1st Sess. 1 (1924) ("[E]ffect of the bill is simply to make the contracting party live up to his agreement."). Thus, the Act only requires arbitration where the parties have contractually bound themselves to arbitrate their disputes. *See Volt*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion."); S. Rep. No. 536, 68th Cong., 1st Sess. 1, 3 (1924) ("The record . . . shows not only the great value of *voluntary* arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been *voluntarily* and *solemnly* entered into.") (emphasis added); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (legislative history demonstrates that Act was not intended to cover arbitration clauses offered to captive customers or employees on a take-it-or-leave-it basis) (Black, J. dissenting), (citing *Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. 9-11 (1923)).

This Court has held repeatedly that "the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute." *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995), (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985)). As this Court noted in its most recent decision on arbitration:

> [T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties.

First Options, 115 S. Ct. at 1925 (citations omitted).

The threshold issue, then, is whether an agreement to arbitrate exists. To decide whether the parties actually agreed to arbitrate, courts generally "should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 1924, (citing *Mastrobuono*, 115 S. Ct. at 1219 & n.9; *Volt*, 489 U.S. at 475-76; *Perry*, 482 U.S. at 492-93 n.9). In this case, the Montana court looked to compliance with the Montana notice statute and invalidated the arbitration provision on that ground. J.A. 28. However, as demonstrated below, this statute is little more than a particular application and codification of general state law contract principles that govern standardized form contracts and that could also have been applied to invalidate the arbitration clause at issue here.

A. General Contract Principles Invalidate Terms in Standardized Contracts That Are Beyond The Reasonable Expectations of a Party.

The law treats contracts of adhesion or standard form contracts, such as the franchise agreement signed by Mr. Casarotto, differently from "ordinary" contracts. *See*

generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 (1983). While standardized agreements serve a useful purpose, courts recognize that the adhering party is unlikely to have read, let alone understood, many of the standard terms before signing the document. Restatement (Second) Contracts § 211, cmts. a & b; *see also* Rakoff, *supra*, at 1179 and citations in nn. 21 & 22. Thus, parties "are not bound to unknown terms which are beyond the range of reasonable expectation." Restatement (Second) Contracts § 211, cmt. f; *see, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176-77 (Iowa 1975) (doctrine of reasonable expectations invalidates insurance policy provision); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 671-73 (N.D. 1977) (same).

To determine whether an unexpected term in a standard form contract should be rendered unenforceable, courts look, in part, to the conspicuousness of the term. Restatement (Second) Contracts § 211, cmt. f. For example, in *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 890 F.2d 108 (9th Cir. 1989), the court excluded warranty disclaimer clauses from a standard form contract because they were not within the reasonable expectations of the signing party and were not conspicuous. *Id.* at 113-14. Similarly, in *Cate v. Dover Corp.*, 790 S.W.2d 559 (Tex. 1990), the court held that "to be enforceable, a written disclaimer of the implied warranty of merchantability : . . must be conspicuous to a reasonable person." *Id.* at 562. According to the *Cate* court, the purpose of the conspicuousness requirement is "to protect the buyer from surprise and an unknowing waiver of his or her rights." *Id.* at 561. Echoing the holding of the *Cate* court, the court in *Burgess Constr. Co. v. State*, 614

P.2d 1380 (Alaska 1980) explained a common judicial response to contracts of adhesion: "An unusual or unexpected term in an adhesion contract which falls outside the weaker party's 'reasonable expectations' will be denied effect against him, unless it has been brought to his attention by express notice, as by clear, plain and conspicuous language on the face of the contract." *Id.* at 1384. The conspicuousness of the term is a significant factor in determining whether provisions contrary to the reasonable expectations of the adhering party will be denied enforcement because the "effect of an adequate notice, of course, is simply to alter preexisting expectations." *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173 n.18 (Cal. 1981).

Thus, courts have repeatedly refused to enforce limitations on liability in standardized form contracts in the absence of plain, clear, and explicit notice. *See, e.g., Steven v. Fidelity and Casualty Co. of New York*, 377 P.2d 284, 288-94 (Cal. 1963) (insurance policy provisions contrary to the reasonable expectations of the adhering party denied enforcement in the absence of "plain and clear notification" and "an understanding consent"); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 824 (Mont. 1983) ("[H]ousehold exclusion clause [in insurance policy] is invalid due to its failure to 'honor the reasonable expectations' of the purchaser of the policy.").

B. Inconspicuous Arbitration Provisions in Standardized Agreements May Be Invalidated Under General Contract Principles.

The general principle of "reasonable expectations" governing all standardized form contracts has also been applied to invalidate arbitration clauses. *See Broemmer v.*

Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (adhesion contract which required patient to arbitrate medical malpractice disputes was unenforceable as falling outside patient's reasonable expectations where there was no conspicuous waiver); *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 361 (1976) (applying adhesion contract principles to an arbitration clause, court found no agreement to arbitrate where clause not called to the patient's attention). The reasonable expectations doctrine is not, of course, applied indiscriminately to invalidate all arbitration clauses in standardized form contracts. Instead, the ultimate question is whether the clause was outside the reasonable expectations of the party signing the contract. *See* John L. Di Fiore, *Problems in Alternative Dispute Resolution: Arbitration Agreements as Contracts of Adhesion in Consumer Securities Disputes*, 93 Com. L.J. 259, 276-77 (1988) (arbitration not reasonably anticipated by the ordinary individual in certain factual circumstances).

Thus, while Montana law recognizes the general principle that unexpected provisions in standardized contracts are invalid if not conspicuous, in two cases where the claim was raised, the Montana Supreme Court has rejected the argument that arbitration clauses in adhesion contracts are void when the record does not support the claim that the clause was outside the reasonable expectations of the adhering party. *See Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26, 30 (Mont. 1993); *Passage v. Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1301-02 (Mont. 1986). Both cases involved brokerage agreements. In *Passage*, the Montana court found that "[t]here is nothing in the record to indicate that the arbitration clause in the [one-page] client agreement form was not within the parties'

reasonable expectations." 727 P.2d at 1302. In *Chor*, the court relied on the plaintiff's own testimony that she read the arbitration agreements before signing them and understood that "'if I were to have any problems, that we would agree to arbitrate the problem.'" 862 P.2d at 30. Based on the plaintiff's actual knowledge of the arbitration clause, the court refused to invalidate the arbitration provision even though the court was well aware that the statutory notice requirement had not been met. *Id.* at 34.

Thus, any argument that the Montana notice statute is overbroad because it applies to situations beyond what the common law would allow must be rejected. The Montana Supreme Court will not invalidate an arbitration provision based solely on noncompliance with the statutory notice requirement, if the signing party knew and understood that he or she was signing a contract that included an arbitration provision. *Id.*; *see also Cate*, 790 S.W.2d at 562 (inconspicuous disclaimer of implied warranty of merchantability is unenforceable "unless the buyer has actual knowledge of the disclaimer"). On the other hand, while the Montana court rejected arguments based on adhesion contract principles in *Passage* and *Chor*, the Court affirmed the vitality of the doctrine and plainly left the door open to the possibility that, in a more compelling case, it would void the arbitration provision.

The facts of the instant case clearly fall within the general principle that inconspicuous, unexpected clauses are not enforceable. Here, the contract at issue was the first and only franchise agreement that Mr. Casarotto had ever signed. J.A. 87. Mr. Casarotto was told that it was a standard agreement and that he could make no changes or modifications to it. J.A. 87. There were no negotiations

over the terms of the agreement; Mr. Casarotto could only take it or leave it.[5] And, although Mr. Casarotto read the agreement before signing it, he did not realize that he was giving up his right to sue DAI in Montana. J.A. 87. Based on these facts, even absent the Montana notice statute, the Montana court could well have found that the franchise agreement was a standardized form contract and that, because the arbitration provision was not conspicuous and was not within the reasonable expectations of Mr. Casarotto, it was invalid.[6]

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[5]Mr. Casarotto's experience in this regard is not uncommon. According to a 1990 report by the House of Representatives Committee on Small Business, a "serious imbalance of power exists" between franchisors and franchisees: "Advantages of financial strength, access to information and to legal advice create a gross disparity of bargaining power in favor of the franchisor that results in one-sided franchise agreements that are offered, and generally accepted, on a take-it-or-leave-it basis." *Staff of House Comm. on Small Business, 101st Cong., 2d Sess., Franchising in the U.S. Economy: Prospects and Problems* 49 (Comm. Print 101-4, 1990).

[6]Indeed, the Montana court has recognized that, in franchise agreements, the franchisor often has a superior bargaining position. *See Dunfee v. Baskin Robbins, Inc.*, 720 P.2d 1148, 1150 (Mont. 1986). In a case involving a remarkably similar dispute to the merits of this case, the Montana court upheld a jury's verdict that a franchisor had breached the duty of good faith by refusing the franchisee's request to relocate and by misrepresenting the lease arrangement during the discussions. *Id.* at 1154. In so holding, the Montana court recognized that the dispute did not arise from a negotiated contract but from a form contract and looked to the "reasonable expectations" of the weaker party, the franchisee. *Id.* at 1153; *see also* Scott Burnham, *Bad Faith: Courts Find Breaches of Fair Dealing Applicable to Commercial Contracts Too*, Mont.

(continued...)

The fact that a state court might invalidate an arbitration agreement under adhesion contract principles does not reflect any hostility towards arbitration agreements. For example, in finding an arbitration clause invalid, a California appellate court emphasized that "there is no rule or public policy against an agreement between a patient and a hospital to arbitrate any medical malpractice claim arising out of the hospitalization." *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d at 354. Rather, the issue before the court was whether the plaintiffs had indeed agreed to arbitrate the controversy. *Id.* Recognizing that "[i]t has long been the public policy of this state to favor arbitration over litigation as a means of settling disputes because it is expeditious, avoids the delays of litigation, and relieves court congestion," *id.* at 355, the court nonetheless held that the policy favoring arbitration "cannot displace the necessity for a voluntary agreement to arbitrate." *Id.* at 356. The *Wheeler* court then applied adhesion contract principles to invalidate the arbitration provision.[7] *Id.* at 369.

A court decision invalidating a particular arbitration clause based on generally applicable standardized contract principles is not preempted by the FAA. As this Court stated last term, "States may regulate contracts, including

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[6](...continued)
Law. 6, 9 (Nov. 1986) (*Dunfee* court recognized one-sided nature of franchise agreement).

[7]The legal analysis of the California courts concerning adhesion contract principles is particularly relevant here because the Montana courts often look to California case law for contract interpretation because Montana adopted the California Code as it applied to contracts in 1895. *See Miller v. Fallon County*, 721 P.2d 342, 346 (Mont. 1986).

arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Terminix*, 115 S. Ct. at 843 (citing 9 U.S.C. § 2); *see also Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989) (relief "upon grounds 'for the revocation of any contract'" protects "buyers of securities by removing 'the disadvantages under which buyers labor' in their dealings with sellers").

The Montana notice statute is a codification of and particularized application of general common law contract principles that would have allowed the Montana court to invalidate the arbitration provision in this case and in others as well. Indeed, when the statute was enacted, Montana was overruling a century-old law that arbitration agreements were not enforceable, and therefore, it was surely reasonable for the Montana legislature to consider an arbitration clause to be an unexpected term that requires conspicuous notice.

Rather than require the courts to litigate claims that an inconspicuous arbitration provision was beyond a party's reasonable expectations on a case-by-case basis, the Montana legislature has established a bright-line rule that is easily followed by contracting parties. Since the FAA allows states to protect parties from being bound by unknown contract terms under traditional contract law doctrines enforced by the courts, the state legislatures and governors must also have authority to ensure that arbitration agreements are entered into knowingly and voluntarily through statutory enactments based on those same contract doctrines. After all, by serving as a prophylactic against "claims that the agreement to arbitrate resulted from . . . fraud or overwhelming economic power," *Mitsubishi Motors*, 473 U.S. at 627, state laws like

Montana's advance the primary purpose of the Act by making it more likely that arbitration agreements will be enforced.

II. MONTANA'S EFFORT TO ENSURE THAT ARBITRATION AGREEMENTS ARE ENTERED VOLUNTARILY IS NOT PREEMPTED BECAUSE ITS NOTICE REQUIREMENT DOES NOT CONFLICT WITH THE OPERATION OF THE FEDERAL ARBITRATION ACT.

The "basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Terminix*, 115 S. Ct. at 838; *see also Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 225 (1987). When Congress passed the Arbitration Act in 1925, "it was 'motivated, first and foremost, by a . . . desire' to change the antiarbitration rule." *Terminix*, 115 S. Ct. at 838 (quoting *Dean Witter Reynolds*, 470 U.S. at 220). Based on this policy, this Court has found that state efforts to deny enforcement of certain arbitration agreements are preempted by the FAA. *See Terminix*, 115 S. Ct. 834 (state statute making written, pre-dispute arbitration agreements invalid and unenforceable); *Southland*, 465 U.S. 1 (state statute making agreements to arbitrate certain franchise claims unenforceable); *Perry*, 482 U.S. 483 (state statute making unenforceable private agreements to arbitrate certain wage collection claims).

What neither Congress nor this Court has done, but what petitioners now ask, is to extend FAA preemption to even those minimal state attempts to ensure that parties *know* that the contract they are signing includes an arbitration provision. Thus, petitioners seek preemption even though

Montana's notice requirement does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Montana statute does not prohibit arbitration; instead, it sets out a minimal notice requirement that is easily satisfied. In so doing, it provides a significant benefit to both parties entering an arbitration agreement: it ensures notice to adhering parties and establishes a bright line rule for those designing standardized contracts.

There is nothing in the legislative history of the Federal Arbitration Act that indicates Congress intended to go so far as to prevent states from even enacting requirements to ensure that arbitration agreements are entered knowingly. As this Court has repeatedly held, the pre-emptive effect of a federal statute is fundamentally a question of congressional intent. *See, e.g. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, where, as here, the field which Congress is said to have preempted includes areas like consumer protection and contract law that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). There is no such "clear and manifest" congressional intent to prevent states from enacting even minimal measures, like the Montana notice statute at issue here, that relate to the formation of the arbitration contract itself.

Indeed, the legislative history of the FAA reveals that some members of Congress were concerned about the very problem that the Montana statute seeks to address —

arbitration clauses contained in adhesion contracts. During the hearings on the legislation, members expressed concerns with a law which would enforce an arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. *Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. 9-11 (1923). He noted that such contracts "are really not voluntarily [sic] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . ." *Id.* at 9. Similarly, Senator Sterling expressed concerns about contracts between the railroads and shippers "in which there is an agreement to arbitrate, and the representation is made to the shipper, 'You can take it or leave it, just as you please; but unless you sign you can not ship.'" *Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, ("*Joint Hearings*"), 68th Cong., 1st Sess. 15 (1924). Both were assured by the supporters of the bill that it was *not* their intention to cover such cases. *Id.*; *see also Prima Paint Corp.*, 388 U.S. at 414 (1967) (summarizing this legislative history) (Black, J. dissenting).

Indeed, the supporters of the bill downplayed congressional concerns about adhesion contracts by focusing on existing legal protections. For example they pointed out that "[y]ou can not get a provision into an insurance contract to-day unless it is approved by the insurance department." *Joint Hearings* at 15. Clearly, there was no contemplation

that enactment of the FAA would preempt states' ability to regulate arbitration provisions in adhesion contracts, like insurance contracts, in the same manner that other provisions are regulated.

Nonetheless, petitioners argue that the Montana statute is preempted because "it singles out and subjects arbitration agreements to an 'additional limitation under state law' that is not applicable to other contractual provisions." Pet. Brief at 17 (quoting *Southland*, 465 U.S. at 11). Thus, according to petitioners, a state may only require specific disclosure of arbitration provisions if the state requires some additional disclosure for *all* contract provisions — clearly an unworkable scheme. This application of the Act's "equal footing" objective is irrational and is hostile to the objectives of the FAA. Montana does not require particular disclosure of *all* provisions because to do so would not only be impossible, but would defeat the purpose of the special disclosure requirement. Montana requires notice when a party would not otherwise expect a particular provision to be included in a contract; there is no need to provide front-page notice for expected terms like price, service, or credit. Exempting arbitration provisions from *minimal* notice requirements places arbitration agreements on a footing well above other contract terms, contrary to the intent of Congress. *See Volt*, 489 U.S. at 478, (quoting *Prima Paint*, 388 U.S. at 404 n.12 (1967)) (Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so").

In an attempt to demonstrate that Montana's notice statute is contrary to the purposes of the FAA, petitioners manufacture an argument that Montana is hostile to arbitration. Pet. Brief at 17-18. Yet, Montana is not a state

that refuses to enforce arbitration agreements that are knowingly entered. Quite the contrary, in its 1985 reform legislation, the Montana legislature moved state law in a modern pro-arbitration direction, providing for the full enforcement of arbitration agreements that are knowingly entered. And the Montana Supreme Court has followed the legislature's directives in this regard, repeatedly rejecting attempts to invalidate arbitration agreements in the years since this Court's decision in *Southland*, 465 U.S. 1, and Montana's Uniform Arbitration Act was enacted. *See Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26 (Mont. 1993); *Downey v. Christensen*, 825 P.2d 557 (Mont. 1992); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713 (Mont. 1990); *William Gibson Jr., Inc. v. Graff Communications*, 780 P.2d 1131 (Mont. 1989); *Larsen v. Opie*, 771 P.2d 977 (Mont. 1989); *Passage v. Prudential-Bache Secs., Inc.*, 727 P.2d 1298 (Mont. 1986).

Only twice in the last decade has the Montana Supreme Court invalidated an arbitration provision in a contract.[8] First, in *Mueske v. Piper, Jaffray & Hopwood, Inc.*, 859 P.2d 444 (Mont. 1993), the court invalidated an arbitration provision because the clause incorporated the rules of NYSE and NASD as controlling law, yet failed to follow the disclosure requirements of those rules. *Id.* at 450. Consistent with this Court's directive in *Volt*, 489 U.S. 468, the *Mueske* court applied "the general rules of contract interpretation" and held that "the validity of the arbitration

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[8]In one other case, the Montana court refused to compel arbitration because the arbitration clause applied prospectively while the dispute at issue occurred before the arbitration agreement was signed. *See Frates v. Edward D. Jones & Co.*, 760 P.2d 748 (Mont. 1988).

clause be determined according to the incorporated controlling law — the NYSE and NASD rules — unless such rules contravene the substantive law of the FAA." 859 P.2d at 450. The *Mueske* decision was clearly dictated by *Volt*, in which this Court upheld the application of a state arbitration rule, which had been incorporated into an arbitration agreement via a choice-of-law provision, "even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Volt*, 489 U.S. at 479. The only other time the Montana court has invalidated an arbitration agreement is in the instant case, where DAI failed to follow the statutory notice requirement. These two instances are hardly evidence of a judicial hostility to arbitration agreements that the FAA was designed to eliminate.

Petitioners also argue that permitting states to require specific notice of arbitration agreements will significantly disrupt the transaction of interstate commerce and impose additional business costs. Pet. Brief at 23-29. Contrary to petitioners' argument, however, the FAA does not mandate and was not designed to promote uniformity that would allow those involved in negotiating interstate agreements to ignore the requirements of local law.

Moreover, because the industries affected by such mandatory notice provisions are often highly regulated by the states, the claim that the Montana notice requirement establishes more than a trivial burden is implausible. Sophisticated market participants transacting business in multiple states already are obliged to adapt their form contracts, franchise agreements, leases, insurance policies, or securities registrations to the specific requirements of diverse jurisdictions. For example, beginning with the enactment of the California Franchise Investment Law in 1971, fourteen

states have adopted statutes requiring franchise registration and prospectus-type disclosure. These provisions are similar, *but not identical*, to that of California.[9] Thus, in drafting franchise agreements, franchisors must already take into account differing requirements based on the laws of each state in which they are transacting business. *See* Practicing Law Institute, *Franchising* 50 (1992). As a practical matter, counsel for franchisors must pay "careful attention . . . to strict compliance with state franchise registration and disclosure statutes." *Id.* Moreover, "careful attention must be paid to the jurisdictional scope of franchise laws and the transactions they cover." *Id.*

The securities industry faces dual regulation by both the federal government and the states. Every state has enacted a securities act, often referred to as "blue sky" laws,

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[9] *See* California Franchise Investment Law, Cal. Corp. Code, §§ 31000—31516 (West Supp. 1996); *see also* Hawaii Franchise Investment Law; Haw. Rev. Stat., §§ 428-E1—428E-12 (1995); Illinois Franchise Disclosure Act, 815 ILCS §§ 705/1, *et seq.* (1996); Ind. Code Ann. §§ 23-2-2.5-47, *et seq.* (Burns 1995); Md. Bus. Reg. Code Ann. §§ 14-102—14-233 (1995); Michigan Franchise Investment Law, Mich. Stat. Ann. §§ 19.854(1)—(46) (1994); Minn. Stat. §§ 80C.01—80C.14 (1995); New York Gen. Bus. Law, §§ 680—684 (Consol. 1995); North Dakota Franchise Investment Law, N.D. Cent. Code Ann., §§ 51-19-01—51-19-17 (1995); Rhode Island Franchise Investment Act, R.I. Gen. Laws, §§ 19-28.1-1—19-28.1-34 (1995); South Dakota Franchises for Brand-Name Goods and Services Law, S.D. Codified Laws Ann., §§ 37-5A-1—37-5A-87 (1995); Texas Business Opportunity Law, Tex. Rev. Civ. Stat. Ann. art. 5069-16.01 (West 1996); Virginia Retail Franchising Act, Va. Code Ann. §§ 13.1-557—13.1-574 (1995); Washington Franchise Protection Act, Wash. Rev. Code §§ 19.100.010, *et seq.* (1995); Wisconsin Franchise Investment Law, Wisc. Stat. §§ 553.01—553.78 (1994).

regulating securities distribution and broker-dealer activities. Thomas Lee Hazen, *The Law of Securities Regulation* 328 (2d ed. 1990). Many states also regulate tender offers and activities of investment advisers. *Id.* "The various state laws differ significantly from one another." *Id.* While thirty-nine jurisdictions have adopted the 1956 Uniform Securities Act, there is still considerable variation particularly concerning registration requirements. *See, e.g.*, Cal. Corp. Code §§ 25000-25804; N.Y. Gen. Bus. Law §§ 352-359-h.

Similarly, any contention that the insurance industry requires national uniform standards to operate effectively in interstate commerce is not credible. "Administrative regulation of insurance has been and continues to be primarily the responsibility of state authorities rather than the federal government." Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 8.1(a), at 930 (1988). In fact, insurance industry lobbyists played a key role in the enactment of state statutes to avoid the regulatory authority otherwise available under the McCarran-Ferguson Act, 15 U.S.C. § 1012. *Id.* at 931-32. Every state has adopted legislation regulating insurance transactions and companies and has designated a state administrative officer (usually characterized as a commissioner of insurance) to supervise the forms of insurance organizations, their financial stability, the terms of policy forms, licensing provisions, and mechanisms for ensuring insurer liquidity or rehabilitation in case of insolvency. *Id.*, § 8.2(b), at 940. There is enormous variation among states in their regulation of insurance transactions including extensive, mandatory proscriptions of

notice and disclosure provisions in state-approved policies.[10] Even within a given state, insurers must conform policies according to the class of insurance.[11] Moreover, though insurance companies may typically use standard forms offering a limited number of options, the standardization of forms through state-mandated language and disclosures has been a deliberate state legislative and administrative response to deal with the concern that insurance contracts present the problems of the "prototypical" adhesion contract. *See* Keeton & Widiss, *supra*, § 2.8(a), at 120 n.2

Against this backdrop of differing state requirements, any claim that the simple arbitration notice required by Montana would seriously disrupt business is clearly exaggerated. Indeed, it is easier for nationwide businesses to comply with a statutory requirement than to guess what the common law would require.

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[10] *See, e.g.*, Cal. Ins. Code § 332 (1995) (general disclosures); New York Ins. Law § 3404 (1995) (fire insurance policy); Minn. Stat. § 60A.207 (1995) (notice of surplus lines insurance act); Mich. Comp. Laws § 550.1410a (1994) (provisions for group certificates under Nonprofit Health Care Corporation Reform Act).

[11] *See, e.g.*, Cal Ins. Code § 778.4 (disclosures re fire and casualty broker-agents); *Id.*, 779.14 (rights to rescind credit life and disability insurance); *Id.*, § 10086 (earthquake insurance); *Id.*, § 10127.11 (life insurance policies for senior citizens), *Id.*, § 10127.8 (advertisements for term life insurance directed to individuals ago fifty-five and older); *Id.*, § 10194.7 (supplemental Medicare disclosure); *Id.*, § 11580.1 (disclosure for motor vehicle insurance).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

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